

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DANIEL KLEEGERG, LISA STEIN, and
AUDREY HAYS,

Plaintiffs,

v.

Civil Action No. 16-CV-9517(LAK)

WENDY EBER, in her individual
capacity and as Executrix u/w/o LESTER
EBER; ALEXBAY, LLC f/k/a LESTER
EBER, LLC; LUCIA GORDON GUMAER
and PATRICK D. MARTIN solely in their
capacities as Executors under the will
of ELLIOTT W. GUMAER, JR.; and,

[PROPOSED] JUDGMENT

Defendants,

and

EBER BROS. & CO., INC.; EBER BROS.
WINE AND LIQUOR CORP.; EBER
BROS. WINE & LIQUOR METRO, INC.;
EBER-CONNECTICUT, LLC; EBER-
RHODE ISLAND, LLC; EBER BROS.
ACQUISITION CORP.; EBER-METRO,
LLC; SLOCUM & SONS OF MAINE, INC.;
and CANANDAIGUA NATIONAL BANK
& TRUST COMPANY,

Nominal Defendants.

LEWIS A. KAPLAN, *District Judge*.

WHEREAS, a decision granting partial summary judgment to plaintiffs was rendered by Magistrate Judge Katharine H. Parker on March 25, 2021;

WHEREAS, a bench trial was held before this Court on September 14, 15, 21, and 22, 2021;

WHEREAS, after due deliberation, a memorandum opinion was published on March 30, 2023, rendering a verdict for plaintiffs and granting certain interim injunctive relief, including making plaintiff Daniel Kleeberg interim receiver for nominal defendants Eber Bros. & Co., Inc. (“EB&C”); Eber Bros. Wine and Liquor Corp. (“EBWLC”); Eber Bros. Wine & Liquor Metro, Inc. (“Eber Metro”); and Slocum & Sons of Maine, Inc. (“Slocum Maine”) and ordering that shareholder meetings and elections for those companies be held within 7 days;

WHEREAS, in the Court’s verdict (pages 89–90), it inadvertently omitted to include Lester Eber’s compensation of \$141,404 from EBWLC in the first part of 2008¹;

WHEREAS, on March 30, 2023, Daniel Kleeberg dismissed the existing Board of Managers of Eber-Connecticut, LLC (“Eber-CT”), and appointed a new board, which, immediately thereafter, terminated the employment of Wendy Eber as President and CEO of Eber-CT and replaced her with Daniel Kleeberg;

WHEREAS, by agreement on April 5, 2023, the parties agreed that the 750 voting preferred shares of EBWLC issued to Lester Eber in 2017 should be deemed canceled without consideration rather than voided;

WHEREAS, on April 5, 2023, after notice being served on all concerned parties including Wendy Eber five days in advance, shareholder and board meetings were held for EB&C, EBWLC, Eber Metro, and Slocum Maine, with board members and officers (president, secretary, and treasurer) duly elected for each, thus ending the temporary receivership;

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Defendants failed to produce a W-2 for this compensation, but other records prove that EBWLC paid Lester’s compensation through May of 2008 (Ex. 221 (May 2008 email from Wendy Eber to Lester, stating, “I suggest your and my salaries move to CT on June 1, 2008.”) and in that specific amount (Ex. 267 at 275 (telling the IRS that Lester was paid “\$141,404” in 2008)). It is possible that the number disclosed in the IRS presentation is slightly different than what was reported on a W-2, but it is clear that some substantial amount was paid to Lester in 2008 and defendants should not be rewarded for failing to produce that W-2. [See also Pls. Proposed Findings of Fact ¶ 22 (citing Ex. 267 for the combined 2008 compensation number).]

It is now, therefore, ORDERED, ADJUDGED, and DECREED that:

1. Nominal defendant Canandaigua National Bank (“CNB”) is directed to distribute the stock of EB&C one third to Wendy Eber in her capacity as executrix of Lester’s estate, one third to Audrey Hays, one sixth to Daniel Kleeberg, and one sixth to Lisa Stein; defendants shall execute such documents and take such actions as CNB or plaintiffs reasonably may request to effectuate that distribution.
2. The 2012 transfer of Eber Metro to Alexbay is set aside; EBWLC owns, and has at all relevant times owned, 100% of the equity in Eber Metro.
3. Wendy Eber’s Employment Contract and void and set aside, and a constructive trust is imposed on the 2,000 shares of Eber Metro issued to Wendy thereunder such that Wendy must disgorge any distributions made to her thereunder that may be later discovered.
4. Lester Eber’s April 2012 Employment Contract is void and set aside.
5. The 2010 transfer of 6% of Eber-CT from Eber Metro to Polebridge Bowman, and thereafter to Wendy Eber, is void and set aside; Eber Metro owns, and has at all times since 2008 owned, 85% of Eber-CT.
6. All shares of Slocum Maine are to be reconveyed to Eber Metro or directly to another person or entity designated by Eber Metro with the consent of all shareholders in the chain of ownership of Eber Metro; this shall not limit Eber Metro’s ability, in the absence of unanimous consent, to transfer ownership of Slocum Maine to another party after receiving the shares from defendants.

7. Wendy Eber is prohibited from serving as an officer or director of EB&C, EBWLC, Eber Metro, or Slocum Maine until March 30, 2025.
8. The 750 voting preferred shares of EBWLC issued to Lester Eber in February 2017 are canceled and deemed to have had no value.
9. The Estate of Lester Eber shall pay EBWLC \$5,045,361.06 of principal disgorgement (the net amount after credit for \$803,265.86 owed by EBWLC to Lester) and \$5,359,026.80 of interest through the date of the verdict—\$10,404,387.86 combined—plus \$1,442.13 of interest per day thereafter.
10. The Estate of Lester Eber shall pay Eber-CT \$3,367,278.86 of principal disgorgement and \$1,960,172.16 of interest through the date of the verdict—\$5,327,451.02 combined—plus \$830.29 of interest per day thereafter.
11. Wendy Eber shall pay Eber-CT \$3,552,417.97² of principal disgorgement and \$1,524,154.16 of interest through the date of the verdict—\$5,076,572.13 combined—plus \$875.94 of interest per day thereafter.
12. Wendy Eber shall pay Slocum Maine \$10,000 of principal disgorgement and \$7,416.99 of interest through the date of the verdict—\$17,416.99 combined—plus \$2.47 of interest per day thereafter.
13. The Estate of Lester Eber shall pay Slocum Maine \$10,000 of principal disgorgement and \$7,416.99 of interest through the date of the verdict—\$17,416.99 combined—plus \$2.47 of interest per day thereafter.

² This includes the actual compensation paid to Wendy Eber from January 1, 2021 through the verdict, as that information was provided to plaintiffs' counsel by Eber-CT's CFO.

14. Wendy Eber shall pay plaintiffs \$650,000 of punitive damages, split evenly among the three individuals—\$216,666.66 to each; interest shall accrue only after entry of this judgment.

The Clerk of Court is directed to forward copies of this judgment to all counsel of record.

SO ORDERED.

Dated: April __, 2023

LEWIS A. KAPLAN
United States District Judge